Supreme Court, U. S.
FILED
APR 19 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1976
No. 76-1445

SIMONE MAUGNIE,
Petitioner
COMPAGNIE NATIONALE AIR FRANCE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBERT S. GOLBERT, ESQ.
Counsel for Petitioner
1800 Century Park East
Los Angeles, CA 90067
(213) 277-0300

HERBERT COLDEN, ESQ.
of Counsel
10850 Wilshire Blvd.
Los Angeles, CA 90024

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. _____

SIMONE MAUGNIE,

Petitioner

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT S. GOLBERT, ESQ.
Counsel for Petitioner

1800 Century Park East
Los Angeles, CA 90067
(213) 277-0300

HERBERT COLDEN, ESQ.
of Counsel

10850 Wilshire Blvd.
Los Angeles, CA 90024

TOPICAL INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	20
APPENDIX - OPINION OF THE NINTH CIRCUIT COURT OF APPEALS No. 74-2672, DATED JANUARY 19, 1977	

TABLE OF AUTHORITIES

Page

Cases

Bingler v. Johnson
89 S.C. 1493;
349 U.S. 741 (1969) — 15

Charles Dowd Box Co. v. Courtney
82 S.C. 519;
368 U.S. 514 (1962) — 16

Day v. Trans World Airlines, Inc.
528 F.2d 31 (2d Circuit 1975)
cert. denied __U.S.__
(October 12, 1975) — 8, 11

Evangelinos v. Trans World Airlines, Inc.
Civil No. 74-165 (3rd Circuit, filed May 4, 1976); reversing
396 F.Supp. 95 (W.D.Pa. 1975) — 8, 13

F.T.C. v. Flotill Products, Inc.
88 S.C. 401;
389 U.S. 179 (1967) — 16

In Re Rel Aviv
405 F.Supp. 154
(D.C.P.R., 1975) — 13

MacDonald v. Air Canada
439 F.2d 1402
(1st Circuit, 1970) — 3, 7, 18, 19

Page

Mache c. Air France (1968)
D.S. Jur. 515 (1967), Revue Francaise de Droit Aerien 343 (Cour d'Appel, Rouen), aff'd (1971) D.S. Jur. 373 (1970) Revue Francaise de Droit Aerien 311 (Cass. Cir. lere) — 14

Maugnie v. Air France
Civil No. 74-2672 (9th Circuit, filed January 19, 1977; Appendix A1 - A12) — A-1, A-12

N.L.R.B. v. Metropolitan Life Insurance Co.
85 S.C. 1061;
380 U.S. 438 (1965) — 16

United States v. Muniz
83 S.C. 1850;
374 U.S. 150 (1963) — 16

Waterman Steamship Corp. v. United States
85 S.C. 1389;
381 U.S. 252 (1965) — 16

Constitution

Article III, Section 2 — 4
Article II, Section 2 — 4
Article VI, Clause 2 — 4

Statute

28 U.S.C. §1254 (1) — 2

Page

Treaties

Treaty for the Unification of Certain Rules Relating to International Transportation by Air concluded at Warsaw, October 12, 1929; entry into force, October 29, 1934; 49 Stat. 3000; TS 876 IV Trenwith 5250 4

International Agreements

Agreement between the Civil Aeronautics Board of the United States and, inter alia, Campagnie Nationale Air France; Approved pursuant to Section 412 Federal Aviation Act, 1958, on May 13, 1966, Docket No. 17325, Order No. E-23680, Vol. 31, No. 97, Federal Register 7302 (Thursday, May 19, 1966) 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

No. _____

SIMONE MAUGNIE,

Petitioner

vs.

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on January 19, 1977.

OPINIONS BELOW

The opinion of the District Court for the Central District of California was case number 73-1600-WMB-Civil. The opinion of the Court of Appeals for the Ninth Circuit is numbered 74-2672.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on January 19, 1977, and copies thereof are appended to this petition in the Appendix at pages 1-12. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

In a suit under the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention") 49 Stat. 3000 (1934) as amended by the Montreal Interim Accord [approved by the Civil Aeronautics Board, May 13, 1966, Order E-23680, 31 Fed. Reg. 7302 (1966)], Petitioner sought to establish a cause of action under Article 17 of the Warsaw Convention for injuries suffered in the air terminal at Paris, Orly Sud.

The District Court properly concluded that actions under the Warsaw Convention can only be maintained for injuries suffered "...on board the aircraft or in the course of any of the operations of

embarking or disembarking." [Warsaw Convention of 1929 Article 17]. The District Court then concluded that "disembarkation operations are terminated once a passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal." [Citing MacDonald v. Air Canada 439 F.2d 1402, 1405 (CCA 1st, 1971)]. The Court of Appeals affirmed. The questions presented are:

1. Whether petitioner's injury falls within the ambit of Article 17.

2. Whether the term "in the course of...disembarking" comprehends accidents which result in injury to passengers inside an airline terminal.

3. Whether distinguishing "embarking" passengers from "disembarking" passengers for purposes of application of Article 17 is a meaningful distinction.

STATUTES, FEDERAL, AND REGULATIONS INVOLVED

The pertinent portion of the Warsaw

Convention, Article 17, provides as follows:

"[Article 17] The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

STATEMENT

The action arises under the Constitution of the United States, Article III, Section 2, Article II, Section 2 and Article VI, Clause 2; the Treaty of the United States with, inter alia, the Republic of France for the Unification of Certain Rules Relating to International Transportation by Air concluded at Warsaw, October 12, 1929 entering into force for the United States of America, October 29, 1934; 49 Stat. 3000; TS 876; IV Trenwith 5250; the Agreement between the Civil Aeronautics Board of the United States with, inter alia, Compagnie Nationale Air

France, approved pursuant to Section 412 of the Federal Aviation Act of 1958, as Amended, and filed with other governments as required and approved by said Board pursuant to said Section 412 on May 13, 1966, Docket No. 17325, Order No. E-23680, Vol. 31, No. 97, Federal Register 7302 (Thursday, May 19, 1966); and as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

This suit under the Warsaw Convention arises from injuries suffered by petitioner as a result of an accident which occurred while petitioner was disembarking from respondent's flight 004 in the south wing of Orly Airport at Paris, France, on Sunday, September 12, 1971. Petitioner fell upon her back and suffered severe bodily injury including a combined lumbo sacral sprain and an "L-1" compression fracture of her back. The basic facts, which are not in dispute, are as follows:

On September 3, 1971 petitioner contracted with Air France, an international air carrier party to the Montreal Interim

Accord, for a flight from Los Angeles, California to Paris, France where she was to transfer to Swiss Air for a flight to Geneva, Switzerland. Upon her arrival in Paris, petitioner was directed by the Air France ground crew to exit from the Air France plane into the air terminal and to proceed down the only passenger corridor leading from the Air France gate to the main terminal area. In this corridor, approximately half way between the airline gate and the common area of the terminal, petitioner slipped on the highly polished floor and fell, incurring the injuries above noted which gave rise to the complaint. The parties stipulated that the trial of this action be bifurcated, and that the issue of the liability of respondent be tried by the court. The parties also stipulated to the basic facts and the District Court made its findings of fact substantially in the form as stipulated. The District Court then made, inter alia, the following conclusions of law:

1. Actions under the Warsaw Convention can only be maintained for injuries suffered "on board the aircraft or in the course of any of the operations of embarking or disembarking." Warsaw Convention of 1929, Article 17.

2. Disembarkation operations are terminated once a "passenger has descended from the plane by use of whatever mechanical means have been supplied and has reached a safe point inside the terminal." MacDonald v. Air Canada 439 F.2d 1402, 1405, (CCA 1st 1971).

On appeal, the Court of Appeals affirmed. The majority of the court eschewed the purely mechanical application of Article 17, as established by the MacDonald court, which would emphasize simply the location of the passenger (CCA Opinion page 9), preferring instead "...an approach which requires an assessment of the total circumstances surrounding a passenger's injuries, viewed against the background of the intended meaning of Article 17..." (ibid)

It nevertheless concluded that petitioner's "claim does not come within the

scope of the Convention. [Petitioner's] situation contrasts sharply with the status of passenger's in Day [Day v. Trans World Airlines, Inc., 528 F.2d 31 (1971)] and Evangelinos [Evangelinos v. Trans World Airlines, Inc., Civil Number 74-165, Third Circuit Court of Appeals filed May 4, 1976]. There the passengers had obtained their boarding passes and were standing in line at the departure gate waiting to be searched immediately before boarding. On those facts, it was reasonable for the courts to conclude that the travelers were involved in embarkation operations. [Petitioner], on the other hand, had deplaned and was headed for the Swiss Air gate to make her connecting flight to Geneva at the time of injury. ...Under these circumstances, we find that appellant had completed disembarkation operations within the meaning of Article 17." (CCA Opinion pages 9 and 10). Essentially, then, the Court of Appeals has distinguished petitioner's case from the claimants in Day and Evangelinos in that those passengers were embarking and petitioner was

disembarking; that because the embarking passengers were determined in Day and Evangelinos to be under the control of the airline and because in the instant case petitioner "was acting at her own direction and was no longer under the 'control' of Air France...," petitioner, unlike the plaintiffs in Day and Evangelinos, falls without the meaning of Article 17.

REASONS FOR GRANTING THE WRIT AS A MATTER OF RIGHT

The decision below should be reviewed because it erroneously interprets Article 17 of the Warsaw Convention so as to make an artificial distinction between "embarking" and "disembarking" passengers. Even the device used for such distinction, "control," is without merit in that a disembarking passenger is in no more control of his or her own destination, path or options than an embarking passenger. In the instant case, petitioner was directed by the respondent's ground crew down the "only passenger corridor leading from the Air France gate to the main terminal area." [CCA Opinion page 2]. There was no other path she could have taken in order to proceed to her destination and, contrary to the conclusion of the Court of Appeals [page 10 of its Opinion which conflicts with its own correct original statement of the facts], she had not proceeded "into a common passenger corridor of Orly Airport which was neither owned nor leased by Air France." As the record in the District Court will

show, the wing of the airport into which she was disembarking was in the exclusive use of Air France; it would not have been until she reached the main corridor, which passed at a ninety degree angle to the corridor down which she was proceeding, that she would have entered "a common passenger corridor of Orly Airport." Even then she would not be out of the "control" of the airline. Air France had control of her baggage and was in the process of transferring it to Swiss Air. Petitioner would not, in fact, have left the responsibility of the respondent as a transit passenger until completion of the transition to the successive air carrier. See Article 30, Warsaw Convention.

The case in fact falls squarely within the "relatively broad construction of Article 17" recommended by the Second Circuit Court of Appeals in Day [528 F.2d 31, 34], because "...affording protection to the plaintiffs under the Warsaw liability umbrella is in harmony with modern theories of accident cost allocation. The airlines are in a position to

distribute among all passengers what would otherwise be a crushing burden upon those few unfortunate enough to become 'accident' victims....Equally important this interpretation fosters the goal of accident prevention....The airlines, in marked contrast with individual passengers, are in a better posture to persuade, pressure or, if need be, compensate airport managers to adopt more stringent... measures...." While the Day court was concerned with "security measures" against "terrorist attacks," the rationale is precisely applicable to safety measures to protect passengers from unsafe conditions within the air terminal, even when those conditions are the responsibility of the airport managers and not of the airlines themselves because "...the companies operate under circumstances more conducive to investigating the conditions at the airports they regularly serve than do their passengers. Moreover, they can better assess the probability of accidents and balance the reductions in risk to be gained by any given preventive measure against its costs." (ibid.)

While there are decisions such as In re Tel Aviv (405 F. Supp. 154) which also seek to exploit a distinction between embarking and disembarking in order to deny Warsaw Convention coverage to an action, such cases often rely on decisions which were themselves discredited on appeal (In re Tel Aviv cited as authority the District Court's opinion in Evangelinos v. TWA, 396 F. Supp. 95, which was reversed by the 3rd Circuit Court of Appeals, case number 75-1990, [May 4, 1976]), or are distinguishable on their facts (the passengers in Tel Aviv had passed Israeli passport control, had retrieved their luggage and were in the process of clearing through customs, all of which acts were outside the "control" of the airline).

To permit the promulgation of such an artificial distinction would be to draw a rule that would permit recovery to victims of air piracy only when they were in the process of embarkation; if they were in the act of disembarking at the time they were gunned down or herded into their air carrier's wing of the

airport, they would be outside the ambit of protection thought to be afforded by the Convention.

In the instant case, the Court of Appeals effectively advised petitioner that she should have sought recovery in France from the Orly Airport authorities, even though this required the Court of Appeals to pass lightly over the leading French precedent for such cases, Mache c. Air France (1968) D.S. Jur. 515 [1967] Revue Francaise de Droit Aerien 343 (Cour d'Appel, Rouen), aff'd, [1971] D.S. Jur. 373 [1970] Revue Francaise de Droit Aerien 311 (Cassation civ. lre), which would have classified her cause of action as one that fell within the coverage of Article 17 of the Convention. Because petitioner elected, as was her right under the Convention (see Article 28) to bring her action in the forum wherein her contract of carriage was made, she finds herself without rights because of conflicting interpretations of the scope of Article 17 coverage between such forum and the alternative forum recommended by such forum. It is a classic case of

"Catch 22" in which uniformity, predictability and justice are all losers.

Even if the distinction were warranted, it would not be applicable to petitioner in that she was either disembarking Air France at the time of the occurrence or embarking Swiss Air for her through flight to Geneva. At no time did she veer from the course set out by respondent's officials for her to follow in order to effect contact with her connecting flight nor was she ever out of their control and direction. There is, thus, no reason to distinguish the facts of petitioner's case from those examined by the Second Circuit Court of Appeals in Evangelinos. There is a clear conflict between the Second and Third Circuits on the one hand and the First [MacDonald] and Ninth Circuits on the other. It is thus appropriate that certiorari be granted in order to "resolve conflict and determine the proper scope of..." Article 17 of the Convention. [Bingler v. Johnson, 89 S.Ct. 1439, 1443, 394 U.S. 741, 748 [1969]].

There is a great abundance of authority where, "because of a conflict with

the decisions of other Courts of Appeals ...[the Supreme Court] granted certiorari" FTC v. Flotill Products, Inc., 88 S.Ct. 401, 403, 389 U.S. 179, 181 (1967); Waterman Steamship Corp. v. United States, 85 S.Ct. 1389, 1393, 381 U.S. 252, 258 (1965); United States v. Muniz, 83 S.Ct. 1850, 1852, 374 U.S. 150, 151 [1963]; N.L.R.B. v. Metropolitan Life Insurance Co., 85 S.Ct. 1061, 1063, 380 U.S. 438, 440-1 [1965]; Charles Dowd Box Co. v. Courtney, 82 S.Ct. 519, 526, 368 U.S. 502, 504 [1962].

The questions presented by this case are of great recurring significance in the interpretation of Article 17 of the Warsaw Convention in particular and the interpretation of the Convention in general. The concurring opinion of Judge Wallace in the decision of the Court of Appeals correctly notes that the Warsaw Convention is a two-edged sword: "The basis of liability is strict but at the same time the amount recoverable is limited." (Court of Appeals decision page 11). But what Judge Wallace fails to note are the consequences deriving

from an overly strict interpretation of the Warsaw Convention. It is clearly preferable in most cases that a plaintiff have access to an United States forum with a cause of action based upon strict liability within the limits imposed by the Montreal Interim Accord, than to be set adrift in a foreign tribunal and required to plead and prove a cause of action for negligence in an alien tongue at great expense in time and money.

If the conflicting decisions herein set forth are permitted to stand without clarification by this Court, the following results could be predicted on their authority:

1. Had Petitioner been in the process of embarking, and had suffered her accident and resultant injury at the same location in the Air France wing of Orly Airport, South, she would have been permitted recovery.

2. If passengers disembarking from one flight are interdicted by terrorists and herded together

with passengers about to embark on another, and all thereafter suffered injury at the hands of their captors, only the embarking passengers would be permitted recovery under the Convention.

3. If a plane goes out of control and crashes into an air terminal injuring both passengers about to embark and other passengers in the same area of the terminal in the process of disembarking from other flights, only those in the process of embarking would fall within the protection of the Convention.

A number of tests now loom ahead for the courts as a result of the castastrophic collision between the KLM and Pan American airliners on the island of Tenerife, Canary Islands [Spain], and the Entebbe hijacking. It is clear that the Convention does not distinguish between "embarking" and "disembarking" passengers and it is error for the courts so to do. Perhaps a MacDonald test which would

reflect the facts of that case and not its obiter dictum would be appropriate. Such a test would recognize a distinction between one who has just entered the airline terminal and one who suffered her injuries at the outer perimeters of a domestic baggage claim area after her baggage had been retrieved. If such a test had been recognized and applied to the instant case, petitioner would not now be seeking this writ. Even with the abortive MacDonald test cited with authority by the courts below, petitioner should be found to be outside its scope as her status as a passenger was not to change until she reached Geneva where disembarkation would be complete.

The serious questions of public policy here involved and the effect of the decision below, if unreversed, upon the law being developed in the Second and Third Circuits make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALBERT S. GOLBERT

Attorney for Petitioner

HERBERT COLDEN
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIMONE MAUGNIE, *Plaintiff-Appellant,* vs. COMPAGNIE NATIONALE AIR FRANCE, *Defendant-Appellee.*	No. 74-2672 OPINION

[January 19, 1977]

Appeal from the United States District Court
for the Central District of California

Before: DUNIWAY and WALLACE, Circuit Judges,
and RICHEY,* District Judge.

RICHEY, District Judge:

On this appeal we are required to interpret the meaning of "disembarking" as used in Article 17 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the "Warsaw Convention"),[1] which provides as follows:

> Article 17. The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, *if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking and disembarking* (emphasis added).

Appellant contends that the district court erred in holding that her injury did not occur in the course of disembarking within the meaning of Article 17. Unpersuaded by appellant's arguments, we affirm.

The facts are not in dispute. In 1971 appellant contracted with Air France, an international air carrier, for flight from

*The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

[1] 49 Stat. 3000 *et seq.* (1934), reprinted at 49 U.S.C. § 1502 Note.

Los Angeles, California, to Paris, France, where she was to transfer to Swiss Air for flight to Geneva, Switzerland. When appellant reached Paris, she exited from the Air France plane and entered the Orly Airport terminal to make her Swiss Air connection. She proceeded down the only passenger corridor leading from the Air France gate to the main terminal area. In a hallway between the airline gate and the center of the terminal, appellant slipped and fell, incurring the injuries which gave rise to the complaint. On reviewing the facts, the district court concluded that "[s]ince at the time of her accident, plaintiff had deplaned the Air France aircraft, had reached a safe point inside Orly Airport, and had proceeded a substantial distance en route to the Swiss Air departure area, the injuries complained of were not suffered 'on board the aircraft or in the course of any operations of . . . disembarking.'" C.R. 67. The court thereupon dismissed the complaint with prejudice, pursuant to stipulation of counsel.

The parties are in agreement that the Warsaw Convention was applicable to appellant's flight from Los Angeles to Paris. The sole dispute on this appeal is whether appellant's injury is comprehended by Article 17. To arrive at a workable definition of the term "in the course of . . . disembarking" as used in Article 17, we may properly look to the history and purpose of the Convention and subsequent interpretations thereof. The scope of the Warsaw Convention is a matter of federal law and federal treaty interpretation, and must be determined from an examination of the "four corners of the treaty." *American Trust Co. v. Smyth*, 247 F.2d 149, 153 (9th Cir. 1957); *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F. Supp. 1238, 1249 (S.D.N.Y. 1975). Moreover, it is well established that treaty interpretation involves a consideration of legislative history and the intent of the contracting parties. *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35-36 (2d Cir. 1975), *cert. denied*, ... U.S. ..... (Oct. 12, 1975); *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 336-338 (5th Cir. 1967); *Rosman v. Trans World Airlines, Inc.*, 34 N.Y. 2d 385, 392, 358 N.Y.S.2d 97, 314 N.E.2d 848, 854 (1974).[2]

[2]Appellant argues that since jurisdiction in this action is based on diversity of citizenship, the district court should have consulted conflicts rules in interpreting the scope of Article 17. It is true that the

The Convention was drafted in the late 20's when the international air transportation industry was in its beginning stages. In order to provide a favorable environment for the industry's growth, various sovereignties agreed to create a uniform body of law governing the rights and responsibilities of passengers and air carriers in international air transportation. *See* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 499-500 (1967); *Block v. Compagnie Nationale Air France, supra*, at 326-351, and authorities cited therein. The drafters of the treaty proposed to limit liability for injuries caused by air accidents and, as an offset, proposed a presumption of liability on the part of the air carrier. As originally drawn, the Convention established a presumption of liability with a liability limitation of $8,300 per passenger for injuries comprehended by Article 17. *See* Articles 20, 22 and 23.[3]

Warsaw Convention does not create a cause of action, but merely creates a presumption of liability if the otherwise applicable substantive law provides a claim for relief based on the injury alleged. *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir. 1957), *cert. den.* 355 U.S. 907 (1957); *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953); *Husserl v. Swiss Air Transport Co., Ltd.*, 388 F. Supp. 1238 (S.D.N.Y. 1975). Thus, conflicts rules are applicable in determining whether a cause of action exists. *E.g., Husserl, supra.* However, the determination of the scope of the Warsaw Convention is a matter of federal law and federal treaty interpretation. Conflicts principles are not applicable in interpreting the words of the Convention; rather, the meaning of Article 17 should be ascertained from the intention of the drafters and the goals of the Convention. *Husserl, supra; Block v. Compagnie Nationale Air France*, 386 F.2d 232 (5th Cir. 1967).

[3]Article 20 provides in pertinent part: "(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

Article 22 provides in pertinent part: "(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs."

Article 23 provides: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention."

In 1965 the United States formally denounced the Warsaw Convention because of the low limitation on damages.[4] Notice of denunciation was withdrawn, however, on the signing of the interim Montreal Agreement. The Agreement, approved by the United States through its Civil Aeronautics Board,[5] established an increased liability limit of $75,000 per passenger for international air transport involving a location within the United States. Additionally, the Agreement imposed absolute liability on air carriers, thus eliminating the defense of due care set forth in Article 20(1).[6]

Today the Convention functions to protect passengers from the hazards of air travel and also spreads the accident cost of air transportation among all passengers. *Day v. Trans World Airlines, Inc., supra,* 528 F.2d at 36. Taking a broad view of the term "accident," courts generally have extended air carrier liability to include injuries resulting from such modern air hazards as hijacking and terrorist attacks. *Evangelinos v. Trans World Airlines, Inc.,* Civil No. 74-165 (3d Cir., filed May 4, 1976); *Day v. Trans World Airlines, Inc., supra; Husserl v. Swiss Air Transport Co., Ltd.,* 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd* 485 F.2d 1240 (2d Cir. 1973); *In re Tel Aviv,* 405 F. Supp. 154 (D.P.R. 1975); *Burnett v. Trans World Airlines, Inc.,* 368 F. Supp. 1152 (D. N. Mex. 1973); *but see Hernandez v. Air France,* No. 76-1146, Slip Op., 8-9 (1st Cir., filed Nov. 19, 1976). However, the courts have not been uniform in construing "in the course of . . . embarking or disembarking" as used in Article 17, due perhaps to the ambiguous history of the Convention and the changes in air transportation technology since the original drafting.

In construing "disembarking," several courts have interpreted Article 17 as defining Warsaw coverage primarily by location of the passenger. In *MacDonald v. Air Canada,* 439 F.2d 1402 (1st

[4]Dept. of State Press Release No. 268, Nov. 15, 1965.

[5]Approved by the Civil Aeronautics Board, May 13, 1966, Order E-23680, 31 Fed. Reg. 7302 (1966).

[6]The Montreal Agreement, not a treaty itself but an agreement among the carriers, did not change the text of the Warsaw Convention. Rather, it modified the terms of the Convention with respect to international transportation involving a location in the United States. *See generally* Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv. L. Rev. 497 (1967).

Cir. 1970), upon which the district court herein relied, injuries sustained by a passenger while awaiting her suitcase in defendant airline's baggage area were held to be outside the scope of the Convention. Relying on the ordinary meaning of the words of the treaty, the First Circuit reasoned that the "operation of disembarking has terminated by the time the passenger has descended from the plane by the use of whatever mechanical means have been supplied and has reached a safe point inside the terminal, even though he may remain in the status of a passenger of the carrier while inside the building." 439 F.2d at 1405.

Additionally, the court noted that the most important purpose of the Convention was to protect air carriers from "the crushing consequences of a catastrophic accident . . . . Neither the economic rationale for liability limits, nor the rationale for the shift in the burden of proof, applies to accidents which are far removed from the operation of the aircraft." 439 F.2d at 1405.

The First Circuit reaffirmed the *MacDonald* decision in *Hernandez v. Air France, supra,* and at the same time indicated its willingness to consider factors other than location of passenger in interpreting Article 17. There the issue was whether Article 17 comprehended passenger injuries incurred in a terrorist attack while passengers were waiting in the baggage retrieval area of the air terminal. Applying the analysis utilized in *Day* and *Evangelinos,* discussed *infra,* the court considered the location of the passengers and, additionally, the nature of the passengers' activity and whether the passengers were under the control of the carrier at the time of injury. The court found that application of those criteria required the conclusion that the *Hernandez* plaintiffs should not recover under the Warsaw Convention.

While recognizing that the "tripartite test of *Day-Evangelinos*" might be useful for close cases, the court preferred an interpretation of Article 17 which placed at least initial emphasis on physical location of the passengers. On reviewing the legislative history of the Convention, the court was persuaded that the Convention delegates intended "embarkation and disembarkation" to mean "essentially the physical activity of entering or exiting from an aircraft." Slip Op., 7-8. Moreover, the court was reluctant to expand air carrier liability to cover all acts of in-terminal terrorism, since the risk of such random violence was deemed

not a risk inherent in air travel. The court concluded that the process of disembarking was completed by the time the passengers had left the aircraft and its immediate vicinity, were inside the terminal and were no longer acting at the direction of the carrier.

In re Tel Aviv, supra, also involved a terrorist attack on passengers who had deplaned and were waiting in the baggage area of the terminal building. Endorsing a test based primarily on physical location of passengers, the district court held that the Convention did not apply. In the court's view, the legislative history of the Convention made clear that the delegates to the Convention intended to exclude from coverage accidents occurring inside an airport terminal building. The court noted that the Warsaw Convention delegates specifically rejected a proposal from the Comité International Technique d'Experts Juridiques Aériens (CITEJA) which would have made the carrier liable from the time travelers, goods, or baggage first enter the airport of departure to the moment when they leave the airport of destination. 405 F. Supp. at 157, citing from Minutes, *Second International Conference on Private Aeronautic Law,* October 4-12, 1929, Warsaw (R. Horner and D. Legrez, transl. 1975) (hereinafter *Minutes*). The court concluded that the *MacDonald* test was appropriate:

> [T]he intent of the Warsaw Conference in rejecting the CITEJA draft and in declining to impose in Article 17 the same extent of carrier liability for passengers as that provided by Article 18 for goods and baggage[7] was clearly to exclude liability as to passengers for accidents which occur after the passenger "has reached a safe point inside the terminal," and "which are far removed from the operation of the aircraft." (Citation omitted.) 405 F. Supp. at 157.

[7]Article 18 provides broad coverage for goods and baggage: "(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air. (2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever."

The court indicated that embarkation and disembarkation might be distinguished for purposes of Article 17, since the embarking passenger must perform certain required acts within the terminal as a condition of completing his journey. In contrast, the disembarking passenger normally "has few activities, if any, which the air carrier requires him to perform" once the passenger has entered the terminal building. At 157 n.2, quoting from *Day v. Trans World Airlines, Inc.,* 393 F. Supp. 217, 223 (S.D.N.Y. 1975). Similarly, other courts have denied Warsaw coverage to in-terminal accidents in the context of disembarkation. *Felismina v. Trans World Airlines, Inc.,* 13 Avi. Cas. 17,145 (S.D.N.Y. 1974) (injury on escalator leading to lower level of terminal); *Klein v. KLM Royal Dutch Airlines,* 46 A.D.2d 679, 360 N.Y.S.2d 60 (2d Dept. 1974) (injury on baggage conveyor belt inside terminal); *cf. Mache v. Air France,* Rev. Fr. Droit Aérien 343 (Court d'Appel de Rouen 1967), *aff'd* Rev. Fr. Droit Aérien 311 (Cour de Cassation 1970) (injury in customs area off the traffic apron).

On the other hand, the Second and Third Circuits have refused to give a strictly geographical interpretation to the language of Article 17 with respect to "operations of embarking." In *Day v. Trans World Airlines, Inc., supra,* and *Evangelinos v. Trans World Airlines, Inc., supra,* the courts of appeals extended Warsaw coverage to personal injury claims of passengers caught in a terrorist attack in the transit lounge of Hellinkon Airport in Athens, Greece. At the time of the attack, the passengers were standing in line at the departure gate ready to proceed to the aircraft.

In *Day,* the Second Circuit unanimously rejected a "rigid location-based rule" as incompatible with the primary goal of the Warsaw drafters—"to create a system of liability rules that would cover all the hazards of air travel." 528 F.2d at 38.[8] In the court's view, the Montreal Agreement, with its imposition of absolute liability and greatly increased liability limits, demon-

[8]The Second Circuit viewed the delegates' rejection of the proposal that carrier liability explicitly cover in-terminal injuries as an indication of the delegates' preference for a flexible approach. The court felt that the most one could infer from the delegates' action was "a reluctance to cover *all* accidents occurring inside a terminal, not a determination that *no* such accidents should be covered." 528 F.2d at 35 n. 12.

strated that protection of the passenger was one of the present-day functions of the Convention. Recognizing that air travel hazards now include terrorism and hijacking and that such perils often spill over into the airline terminal, the court found that injuries resulting from a terrorist attack while passengers were waiting to board were within the scope of Article 17 as modified by the Montreal Agreement.

The court approved of the district court's interpretation of the intended meaning of Article 17. The district judge had rejected the strict location-based formula urged by the airline and had applied instead a tripartite test based on activity (what the plaintiffs were doing), control (at whose direction), and location. *Day v. Trans World Airlines, Inc.*, 393 F. Supp. 217 (S.D. N.Y. 1975).

Similarly, in *Evangelinos, supra,* the Third Circuit in a two-to-one decision, followed the *Day* analysis and rejected the airline's argument that embarkation operations under Article 17 could never occur inside a terminal building. The court reasoned that neither the language of Article 17 nor the delegates' rejection of the CITEJA draft compelled a conclusion that the draftsmen intended a strict location-based test.

> The most that can be said is that the draftsmen rejected the concept of automatic liability for all accidents within the limits of the aerodrome. Our conclusion that under certain circumstances there may be liability for some accidents within a terminal building is not inconsistent with that intent. Slip Op., 9.

The court felt that it was accommodating the principal concerns of those who opposed the CITEJA proposal[9] without going

[9]The court noted that the delegates' chief objection to the CITEJA draft was that the proposal would extend carrier liability to injuries incurred when the airline had no control over the passenger. Slip Op., 9 n.12, citing *Minutes* at 73. The court thus reasoned that where passengers were inside the terminal building but within the control of the airline, they were not automatically excluded from the intended scope of the Warsaw Convention. Chief Judge Seitz, in dissent, urged a more restrictive interpretation of Article 17 which would focus primarily on location of the passenger and secondarily on activity. Under his interpretation, "[o]nly those passengers who have departed from the safety of the terminal and are engaged in the activity of boarding or any of the steps which immediately precede boarding should be granted recovery." Slip Op., 20.

beyond the plain meaning of Article 17 by taking into consideration "the carrier's control over the passengers and the likelihood of injury by causes inherent in air transportation." Slip Op., 9. *See also Husserl v. Swiss Air Transportation Co., Ltd., supra,* 388 F. Supp. at 1245-48, giving a flexible interpretation to the phrase "on board the aircraft" as used in Article 17.

On reviewing the authorities cited to us, we find that a rule based solely on location of passengers is not in keeping with modern air transportation technology and ignores the advent of the mobile boarding corridors utilized by many modern air terminals.[10] Today the expandable boarding units have eliminated to a great extent the need for embarkation and disembarkation outside the terminal building. Thus, determining whether passengers were inside or outside the airport terminal at the time of injury should not end the analysis. Further, we note that some commentators have concluded that "control" is the decisive factor. Shawcross and Beaumont, *Air Law* 441-442 (3d Ed. 1966); Matte, *Traite de Droit Aerien-Aeronautique,* 404-405 (1964) (cited in *Day,* 528 F.2d at 37 n. 17.)

In short, since the Convention drafters did not draw a clear line, this Court is also reluctant to formulate an inflexible rule. Rather, we prefer an approach which requires an assessment of the total circumstances surrounding a passenger's injuries, viewed against the background of the intended meaning of Article 17. Location of the passenger is but one of several factors to be considered.

However, even under the more flexible interpretation of the language of Article 17, appellant's claim does not come within the scope of the Convention. Appellant's situation contrasts sharply with the status of the passengers in *Day* and *Evangelinos.* There the passengers had obtained their boarding passes and were standing in line at the departure gate, waiting to be

[10]In construing the scope of the Convention, we may properly consider changes in circumstances subsequent to the drafting of the treaty. *See Block v. Compagnie Nationale Air France,* 386 F.2d 323, 336-337 (5th Cir. 1967); *Eck v. United Arab Airlines,* 15 N.Y.2d 53, 203 N.E.2d 640 (1964); ALI Restatement Second of Foreign Relations Law §§ 147, 153.

searched immediately before boarding. On those facts, it was reasonable for the courts to conclude that the travelers were involved in embarkation operations. Appellant, on the other hand, had deplaned and was heading to the Swiss Air gate to make her connecting flight to Geneva at the time of injury. She had proceeded through a boarding lounge and into a common passenger corridor of Orly Airport which was neither owned nor leased by Air France. Furthermore, she was acting at her own direction and was no longer under the "control" of Air France. Under these circumstances, we find that appellant had completed disembarkation operations within the meaning of Article 17.

Judgment affirmed.

WALLACE, Circuit Judge, Concurring:

The majority recognizes that application of either the location-of-the-passenger test of *MacDonald v. Air Canada*, 439 F.2d 1402 (1st Cir. 1971), or the tripartite test of *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 45 U.S. L.W. 3280 (U.S. Oct. 12, 1976) (No. 75-1354), results in the same disposition: affirmance of the district court's judgment and denial of recovery to plaintiff Maugnie. It is therefore plainly unnecessary in this case to resolve an important question concerning an international treaty. We ought not to be reaching out to do so.

But if choose I must, I would choose the *MacDonald* test. I agree with the district judge that that test is more in keeping with both a fair reading of the language of Article 17 and the Article's historical derivation. *See generally* Note, *Warsaw Convention—Air Carrier Liability for Passenger Injuries Sustained Within a Terminal*, 45 Fordham L. Rev. 369, 370-76, 379-86 (1976). As the First Circuit just recently noted in *Hernandez v. Air France*, No. 76-1146 1st Cir. Nov. 19, 1976), *aff'g* 405 F. Supp. 154 (D.P.R. 1975):

> We are persuaded that the delegates [to the Warsaw Convention] understood embarkation and disembarkation as essentially the physical activity of entering or exiting from an aircraft, rather than as a broader notion of initiating or ending a trip.

Slip op. at 7-8. Indeed, all

> courts defining "disembarking" have consistently refused to extend the coverage of the Warsaw Convention to encompass injuries occurring within the terminal. The principle, announced in *MacDonald* and followed by the courts in *Felismina* [*v. Trans World Airlines, Inc.*, 13 Av. Cas. ¶ 17,145 (S.D.N.Y. 1974)] and [*In re*] *Tel Aviv* [405 F. Supp. 154 (D.P.R. 1975)], created a standard which emphasized the passenger's location, thereby ending liability when the passenger has reached a "safe" point within the terminal.

Note, *supra*, 45 Fordham L. Rev. at 376.

The *Day* test, on the other hand, suffers from several serious flaws. First, the conclusions reached by *Day*, and by *Evangelinos v. Trans World Airlines, Inc.*, No. 75-1990 (3d Cir. May 4, 1976), *motion for rehearing en banc granted* (June 3, 1976), which follows *Day*, "rest upon a somewhat selective reading of the Warsaw minutes." Note, *supra*, 45 Fordham L. Rev. at 380. In other words, the substantial portions of the legislative history favoring the location test, *see id.* at 380-81, were disregarded.

Second, the *Day* test is bottomed on a social theory of compensation designed to spread the burden of damages from travel to all travelers. By relying on this theory of social engineering, "the *Day* court clearly injected policy arguments alien to the spirit of the Warsaw convention when drafted in 1929." *Id.* at 385. However, it is not possible, in my view, to implement such a theory under the current terms of the Warsaw Convention without such a torturing of language as to constitute a redrafting. The court in *Day*, unfortunately, engaged in such contortions. If the signatories of the Convention wish to redraft it, they may do so, but the courts should not.

Finally, it seems clear to me that the *Day* test was designed to extend a right of recovery to persons for whom sympathy inspires a method of compensation. The *Day* test was meant to be plaintiffs' law. Yet in many cases it may operate to thwart plaintiffs' attempts to recover the full value of their claims. The Warsaw Convention is a two-edged sword: the basis of liability is strict but at the same time the amount recoverable is limited. *See Mache v. Air France*, [1968] D.S. Jur. 515 [1967] Revue Francaise de Droit Aérien 343 (Cour d'Appel, Rouen), *aff'd*,

[1971] D.S. Jur. 373, [1970] Revue Francaise de Droit Aérien 311 (Cass. civ. 1re), where the plaintiff-passenger argued against the applicability of the Warsaw Convention in an effort to avoid its ceiling on recovery. Thus, even if it is accepted on its own terms, the *Day* test may have perverse and unintended consequences.

Accordingly, I concur only in the result.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 1-27-77—410

SINCE 1938
THE BRIEF SHOP
10844 VENTURA BOULEVARD
NORTH HOLLYWOOD, CA. 91604
LAWYERS BRIEF SERVICE
LEGAL & COMM. PRINTING
(213) 877-8620 763-2965